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In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK PETER BALISTRIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the district court (Pet. App. A20-A22) denying the motion in the nature of a writ of error *coram nobis* is not reported. The opinion of the court of appeals (Pet. App. A1-A11) is reported at 606 F. 2d 216.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1979, and a petition for rehearing was denied on December 6, 1979 (Pet. App. A12). The petition for a writ of certiorari was filed on January 31, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred in its handling of petitioner's discovery request or in denying petitioner's motion in the nature of a writ of error *coram nobis*.

STATEMENT

Petitioner was convicted in 1967 after a jury trial in the United States District Court for the Southern District of Illinois on two counts of filing false and fraudulent income tax returns. His conviction was affirmed by the court of appeals. 403 F. 2d 472. This Court denied certiorari. 394 U.S. 985. Subsequently, while a petition for rehearing was pending, the Solicitor General learned of an instance of illegal electronic surveillance, during which petitioner had been overheard, and advised the Court of this information. This Court then remanded the case for proceedings consistent with *Alderman* v. *United States*, 394 U.S. 165 (1969). 395 U.S. 710. After a hearing, the district court held that the illegal surveillance had not tainted petitioner's conviction, and it accordingly reinstated the judgment of conviction. The Seventh Circuit affirmed, 436 F. 2d 1212, and this Court denied certiorari, 402 U.S. 953 (Pet. App. A2).

In 1975, petitioner learned from an affidavit filed in an unrelated criminal case that the Federal Bureau of Investigation had maintained electronic surveillance of Walter Felix Brocca's restaurant from June 10 to December 30, 1964. Petitioner believed that conversations in which he had participated might have been monitored at that restaurant. On January 30, 1976, petitioner filed a motion in the nature of a writ of error *coram nobis*, alleging that the surveillance at Brocca's restaurant had provided evidence or leads to evidence which had been

used at his trial (Pet. App. A2). In response to the *coram nobis* motion, the government submitted the affidavit of an F.B.I. agent, who stated that the original surveillance tapes had been destroyed, but that the still-existing monitoring logs revealed that the monitoring agent believed that petitioner had been overheard or was present at the restaurant during overhearings on July 24[1] and September 30, 1964 (Pet. App. A3; Pet. 13).[2] In a subsequent affidavit, the same agent stated that on two other occasions, on July 25, 1964, and October 23, 1964, petitioner was referred to by others in overheard conversations at the restaurant.

Petitioner, relying on Rules 33, 34 and 36 of the Federal Rules of Civil Procedure, sought discovery in connection with his motion.[3] On the government's

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[1]The affidavit stated (Pet. 13):

> A review of the logs indicated that Frank Peter Balistrieri was incidentally overheard on July 24, 1964, in which the following notation appears:
>
> "Man No. 2 is Frank B. He can't be understood at all—talks too low at this point."
>
> In addition, on July 24, 1964, the following entry appears: "Unknown male (Frank) talks very softly, says Cliff, Frank, anybody call? Oh, . . . (unable to hear few words) . . . Well I'll be there in about 20 minutes, soon as they call—let me know. Alright. Hangs up. (Unable to determine if it was Frank B.)"

[2]The affidavit stated (Pet. 13):

> On September 30, 1964, the following entry appears: "Blackie greeted man as Frank. Normal restaurant business. No conversations."

[3]Specifically, petitioner sought production of all monitoring logs of electronic surveillance at Brocca's restaurant, pursuant to Rule 34 of the Federal Rules of Civil Procedure. Petitioner also served interrogatories on the government seeking a variety of information with respect to the surveillance, including the names of persons

motion, the district court quashed the discovery requests, concluding that the discovery provisions of the Federal Rules of Civil Procedure were inapplicable in *coram nobis* proceedings (Pet. App. A3, A13-A16). Subsequently, the district court conducted an *in camera* inspection of the logs and, in an order filed September 14, 1977, set forth two conversations, one on July 25, 1964,[4] and one on August 6, 1964,[5] in which petitioner had participated (Pet.

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involved with or having knowledge of the surveillance. Finally, petitioner served requests for admissions on the government pursuant to Rule 36.

[4]As set forth in the district court's order (Pet. App. A18), the monitoring logs showed the following:

> 7-25-64 at 12:42 a.m. - "Music starts. Discussion on current political situation. Man No. 1 is Dominic Frenzi—heard to say that Republican Party can't afford to do—Dominic orders three cups of coffee. Jenny called out she wanted coke. Man No. 2 is Frank B. He can't be understood at all—talks too low at this point. Frenzi continues talking. Mentions Republican Party all the time and cussed Goldwater especially in regard to CR and platform. Joking and laughing. Conversation not audible. Frenzi made a crack about the Sheriff of Milwaukee County followed by more laughter. Not audible. Conversation about the DA in Kenosha in joking manner followed by more laughter. Other customers coming and going. Cash register ringing. Frenzi wants to go home and get some sleep. Frank B. heard to say something, but not audible. Somebody wants to buy some drinks on way out—cash register rings, good nights are exchanged, at 1:08 a.m., Restaurant becomes quiet but placed on record."

[5]The second excerpt from the monitoring logs was set forth by the district court as follows (Pet. App. A19):

> On 8-6-64, at 8:27 p.m., the following:
>
> "Two men enter—one is Blackie. Directs other to where the cold water is. Blackie went to cash register—apparently got some change out, as thereafter juke-box started up blocking all conversation. By tone of companion's voice, possibly Frank B. Radio turned on to a ball game also."

App. A17-A19). These conversations had not been previously identified by the government. In the July 25 conversation, Dominic Frenzi, the attorney who represented petitioner at his trial two years later, was present and overheard talking to petitioner (Pet. App. A2-A3, A10, A18).

On November 14, 1978, the district court entered an order denying petitioner's *coram nobis* motion on the merits (Pet. App. A20-A22). The court of appeals, although concluding that the discovery provisions of the Federal Rules of Civil Procedure are available in *coram nobis* proceedings, held that the district court had not abused its discretion in denying petitioner's discovery request and that the district court had properly denied petitioner's motion (Pet. App. A1-A11).

ARGUMENT

Petitioner's argument in this Court (Pet. 20-28) is that the summary dismissal of his motion for a writ of error *coram nobis* without affording him any discovery directly conflicts with various decisions of this Court.[6] He is mistaken in this contention, and the issue he presents does not merit further review.

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[6]This petition presents no issue concerning the availability of the discovery provisions of the Federal Rules of Civil Procedure in *coram nobis* proceedings. Petitioner assumes the correctness of the court of appeals' conclusion that those provisions are available and argues that the denial of discovery was error under the facts of this case. Because the court of appeals correctly concluded that the district court had not abused its discretion in the handling of petitioner's discovery request under the facts of this case, there is no need to reach the more basic issue concerning the availability of the discovery provisions of the Federal Rules of Civil Procedure.

The cases relied upon by petitioner recognize that a post-conviction claim for relief cannot be summarily dismissed where the allegations of the motion are not vague, conclusory, palpably incredible, or patently frivolous or false.[7] But, as petitioner acknowledges (Pet. 20), not "every set of allegations not on its face without merit entitles a * * * [post-conviction claimant] to an evidentiary hearing." *Blackledge* v. *Allison*, 431 U.S. 63, 80 (1977). Indeed, "the district judge * * * may employ a variety of measures in an effort to avoid the need for an evidentiary hearing," including discovery (*id.* at 81).

Although a movant for post-conviction relief may be entitled to discovery in an attempt to substantiate his claim, it cannot seriously be contended that any right to discovery is absolute. Indeed, Rule 26(c) of the Federal Rules of Civil Procedure permits a district court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including" an order that "discovery * * * be had * * * by a method * * * other than that selected by the party seeking discovery." The grant and scope of discovery are questions committed to the sound discretion of the trial court, whose decision may be reversed only on a clear showing of abuse of discretion. *Galella* v. *Onassis*, 487 F. 2d 986, 997 (2d Cir. 1973).

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[7] *Blackledge* v. *Allison*, 431 U.S. 63 (1977); *Harris* v. *Nelson*, 394 U.S. 286 (1969); *Machibroda* v. *United States*, 368 U.S. 487 (1962); *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956).

Contrary to petitioner's claim, he was not denied all discovery here. Rather, the trial court allowed petitioner to obtain *in camera* production of the only existing record evidence of the surveillance, the monitoring logs of the electronic surveillance at the restaurant. Only if the trial court abused its discretion in limiting discovery to this *in camera* inspection would petitioner be entitled to relief.

As the court of appeals correctly recognized (Pet. App. A10), the trial court did not abuse its discretion. Petitioner alleged that he had frequented the restaurant during the period of the illegal electronic surveillance, and that he believed that the government had obtained evidence or leads to evidence by overhearing conversations in which he had engaged during that time (Pet. App. A2). Petitioner's discovery requests included interrogatories, requests for admissions, and a request for the production of documentary evidence.[8] The electronic surveillance of which petitioner complained had taken place approximately 11 years prior to the filing of petitioner's motion (Pet. App. A2), and the only record evidence of the surveillance that was still in existence was the logs of the monitoring, which the trial court reviewed in *camera* (Pet. App. A3, A10).

In such circumstances, it can hardly be said that the district court abused its discretion in denying petitioner's request for broad discovery and, instead, first making an *in camera* inspection of the monitoring logs. Those logs were the best evidence of whether petitioner had been overheard and, if so, of what had been heard. All

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[8] The request for production of documentary evidence sought production of the monitoring logs maintained during the course of the electronic surveillance.

conversations in which petitioner had either taken part or been mentioned were made known to him. None of the conversations could possibly have supplied any evidence or leads to evidence against petitioner,[9] or otherwise affected his prosecution in any way.[10] Although the government did overhear a conversation between petitioner and an attorney who represented him more than two years later at his tax trial, nothing in that conversation concerned legal matters, let alone petitioner's tax liability. Indeed, at the time the conversation occurred in 1964, petitioner had not yet been indicted. Moreover, the overhearing of petitioner's conversation with the attorney was not the object of the electronic surveillance. As this Court, in an only slightly different context, has recently noted, "There being no

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[9]See notes 4 and 5, *supra*.

[10]Petitioner relies heavily on this Court's decisions in *O'Brien* v. *United States*, 386 U.S. 345 (1967) and *Black* v. *United States*, 385 U.S. 26 (1966). In each of those cases, conversations between the defendant and his attorney were overheard through electronic surveillance, and this Court, rather than requiring a hearing to determine whether any overhearing tainted the conviction, remanded for a new trial.

Petitioner contends (Pet. 25) that, since the identical kind of government misconduct is involved here, he is entitled "at the very least to discovery." But, as we have shown, petitioner was given discovery. Moreover, the identical kind of conduct was not involved in this case. The monitoring logs show that, unlike the situation in *O'Brien* or *Black*, only a single conversation between petitioner and an attorney was overheard here. Not only did that conversation occur more than two years before petitioner's trial but, unlike the conversations in *O'Brien* and *Black*, its content was purely social (see Pet. 17). Petitioner has never offered to prove that he participated in substantive legal discussions with the attorney at the restaurant, and the monitoring logs show that no such conversations were overheard.

tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by [the government], there was no violation of the Sixth Amendment." *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977).

Petitioner suggests (Pet. 27-28) that *in camera* inspection of the monitoring logs did not satisfy the requirements of due process. He contends that he was entitled to inspect those logs himself. It is settled, however, that not every instance of electronic surveillance will require more than an *in camera* inspection to determine which parts of the government's records must be made available to the defendant. *Taglianetti* v. *United States*, 394 U.S. 316 (1969).[11] See also *United States* v. *Hoffa*, 436 F. 2d 1243 (7th Cir. 1970), cert. denied, 400 U.S. 1000 (1971); *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970). Petitioner was entitled to be furnished with the logs of only the conversations in which he participated, and the *in camera* inspection provided him with those records. There is no basis for petitioner's claim (Pet. 28-32) that the district court abused its discretion in denying him greater access to files that he had no right to see.

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[11]This Court noted in *Taglianetti* (394 U.S. at 317):

> Nothing in *Alderman* v. *United States*, *Ivanov* v. *United States*, or *Butenko* v. *United States*, *ante*, p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. On the contrary, an adversary proceeding and disclosure were required in those cases, not for lack of confidence in the integrity of government counsel or the trial judge, but only because the *in camera* procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights. Here the defendant was entitled to see a transcript of his own conversations and nothing else.

The decision below is not inconsistent with any decision of this Court or any other court. Petitioner has been afforded all the discovery to which he was entitled, and the matters revealed showed no prejudice to him under the Sixth Amendment or in any other manner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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